IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEALS NO. 24/2003 AND 17/2004.

Employees State Insurance
Corporation, Represented by
its Manager,
local Office, Margao,
Near Rajendra Prasad Stadium,
Margao, Goa. .... Appellant.

Versus

1. M/s. Universal Engineering,
Zorinto, Vasco-da-Gama, Goa.

2. Shri Amascuo Fernandes,
C/o M/s. Universal Engineering,
Zorinto, Vasco-da-Gama, Goa. .... Respondents.

Smt. A. A. Agni, Advocate for the Appellant.

Shri E.O. Mendes, Advocate for the Respondent No.1 - absent.

Shri C.A. Coutinho, Advocate for the Respondent No.2.

CORAM: N. A. BRITTO, J.

DATE: 28th JANUARY, 2005.

ORAL JUDGMENT:

These are appeals again acquittal of the accused by Judgment/Order dated 31.3.2001 in Labour Cases No.188/L/96/I and 189/L/96/I.

2. Since the facts are almost common and both the cases were disposed of

by a common judgment dated 31.3.01, by the learned J.M.F.C., Margao, the same are also being disposed of by this common judgment.

3. The main question before the learned J.M.F.C. was whether respondent No.2 (hereinafter referred to as accused No.2) was the owner or occupier of the establishment and therefore a principal employer of the establishment M/s Universal Engineering situated at Zorinto, Vasco-da-Gama, within the meaning of Section 2(17) of the Employees' State Insurance Act, 1948 (Act, for short) and therefore liable for contravention of some of the provisions of the Act.

4. In both the said cases the trade name of the establishment namely M/s Universal Engineering was shown as accused No.1. The accused No.2 was referred to in the said complaint cases as the Proprietor and occupier of the factory known and styled as M/s Universal Engineering. The first case (Labour Case No.188/L/96) was filed for failure to pay contributions as required by Section 39 of the Act and made punishable under Section 85(a) of the Act. The second case (Labour Case No.189/L/96) was filed for failure to submit the returns as required under Regulation 26 of the E.S.I. (General) Regulations, 1950 made punishable under S.85(e) of the Act. The said contributions were payable for the wage periods from 26.2.94 to March, 1995 and the said returns were to be filed for the period ending 31.3.95 on or before 13.5.1995.

5. The learned J.M.F.C. has acquitted accused No.2 on the ground that the complainant failed to prove that he was the Proprietor and occupier of the

establishment of A.1 , namely the said M/s Universal Engineering. The learned J.M.F.C. also came to the conclusion that the sanction produced by the complainant was vitiated by non-application of mind as the same was granted in a routine fashion.

6. The complaints were filed by Shri Naik who was at the relevant time working as the Manager of E.S.I. Corporation, Margao. The complaints were pursued by Manager Shri Prakash Majumdar who was examined as P.W.1 and who produced some of the documents on behalf of the complainant. The complainant also produced a visit/survey note prepared by the Insurance Inspector and he was examined as P.W.2.

7. The progress of the cases makes interesting reading. Though M/s Universal Engineering was stated to be an establishment owned by A.2 Amascuo Fernandes it was shown as a separate accused when it was not the case of the complainant that the said establishment was either a Company or firm as contemplated by Section 86A of the Act. At one stage the complainant himself filed an application on or about 18.2.2000 stating that as per accused No.2, the Proprietor of accused No.1 (the establishment) was one Mr. Vinod Oza whose address the complainant also mentioned on the said application, as a result of which the learned J.M.F.C. ordered summons to be issued to him. This was after the said Vinod Oza, as proprietor, filed a wakalatnama in favour of Advocate Shri S.N. Karmali and by application dated 4.4.97, filed on behalf of both the accused, accused No.2 was stated to be purely a temporary labour contractor. It appears that thereafter N.B.W. Was ordered to be issued against

the said Vinod Oza which was never executed and the trial proceeded to its conclusion.

8. In the course of the trial the complainant produced the sanction order issued by the Regional Director, a preliminary inspection report (survey report), copy of which was admittedly not handed over to any one in the said establishment and the copy of the survey note prepared by the Inspector Shri Joy Paul.

9. As far as the complainant - P.W.1 Prakash Majumdar is concerned, he clearly stated that the establishment of A.1 was a proprietary concern and that he was not having any record to show as to who was the proprietor of A.1. Here it may be noted that although according to P.W.2 Form No.0-1 (employees registration form) was handed over to A.2, the fact remains that the same was not submitted to the office of Complainant, and, one fails to understand as to why the Complainant chose to rush with the filing of the said complaints. Again, P.W.1 Majumdar stated that A.2 was looking after the day to day affairs of the said factory and therefore was responsible for the payment of contributions as well as filing of the reports. When it was specifically suggested to him, he stated that he did not know whether Vinod Oza had appeared on behalf of A.1 after summons were served on him. He also stated that he did not know whether the said Vinod Oza was the owner of A.1. It is therefore obvious from the evidence of the complainant himself that even after filing the said application to the Court to issue summons to the said Vinod Oza as the Proprietor of the establishment, of A.1 that the complainant was unable to

say as to who was the owner or proprietor or the occupier of the said establishment. The complainant therefore brought in the evidence of P.W.2 Joy Paul who at the relevant time was working as an Inspector of the said Corporation and who claimed that he had inspected the said establishment on 26.2.1994.

10. The learned Advocate Mrs. Agni on behalf of the appellant-complainant has submitted that the said visit note shows that it was received by A.2 as the employer of the establishment (A.1) and therefore the same ought to be considered as sufficient evidence to prove the fact that A.2 was the proprietor and therefore the principal employer of the establishment (A.1).

11. On the other hand Shri Coutinho, the learned counsel, on behalf of the said accused, submits that the said visit note was prepared at the most on 26.2.94 but was handed over on 27.2.94 which date A.2 has clearly written below his signature. Shri Coutinho has further submitted that the said note at the most could be evidence that A.2 had received a copy of the same and nothing more. Shri Coutinho has placed reliance on a decision of this Court in the case of **Moinoddin s/o Khodboddin v. State of Maharashtra (2003 Vol. 105 (2) Bom. L.R. 296)** wherein this Court observed as follows:-

" The complainant, admittedly; has not produced any document to show that the accused is the proprietor of 'Ajanta Hotel'. Such evidence was possible because business establishments are required to be registered and licensed under various provisions. This being a prosecution and

consequences being penal, the fact that petitioner was proprietor and, therefore principal employer ought to have been established beyond all reasonable doubts and not by preponderance of probability. “

12. I am entirely in agreement with the submissions made on behalf of A.2.

13. Section 45 of the Act gives powers to Insurance Inspectors, which inter alia, enables such Inspectors to (a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act; or (b) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such Inspector or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary; or © examine, with respect to any matter relevant to the purposes aforesaid the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Inspector or other official has reasonable cause to believe to be or to have been an employee; (d) make copies of, or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises. “

14.P.W.2 Joy Paul who claims to have visited the said establishment [A.1] on 26.2.94 chose to hand over Form No.0-1 with the employer, as stated in the

said survey note, but did not care even to mention the name of the said employer. If the said establishment was working on electricity, then certainly the electricity meter would have been in the name of some person or the other which details the said Joy Paul chose not to collect. Moreover, the said establishment would have been registered under the Shops and Establishments Act , 1973, and a certificate to that effect would also have been available. He chose not to collect any such certificate. As said before, P.W.2 Joy did not even wait for Form 0-1 to be submitted. In my view and as rightly pointed out on behalf of the accused, the signature of A.2 on the said visit note at the most can be considered as proof of having accepted the said visit note and that too on 27.2.94. Whether the said visit note/survey note was prepared on 26.2.94 or not is not free from doubt because the date as to when it was prepared has been consistently changed at least at three places on the said survey report. The complainant himself appears to have been not knowing as to who was the exact owner or occupier of the establishment of A.1 and for that reason at one stage requested the Court to get the summons issued to the said Vinod Oza as proprietor. Having taken that stand it was not open to the complainant to turn round again and maintain his earlier stand that A.2 was the owner or occupier of the said establishment [A.1]. Certainly it was expected of the complainant to have proved with some reliable evidence that A.2 was the owner or occupier of the establishment [A.1] which the complainant miserably failed to prove.

15. In this view of the matter, in a criminal proceeding, A.2 could not be saddled with the liability of contravening the provisions of the Act referred to

hereinabove.

16. As far as the matter of sanction is concerned, in my view, the learned Magistrate does not appear to have been right in concluding that the said sanction was vitiated for non-application of mind. The complainant had produced the said sanction at Exh.PW.1/A) and had identified the signature of the Regional Director. The said sanction, on the face of it, showed that the said Regional Director had read the papers concerning the prosecution and thereafter had proceeded to grant the said sanction. In fact, there was no dispute at all raised on behalf of the accused inasmuch as there was not even cross-examination as regards th validity of the said sanction. On this aspect, Smt. Agni, the learned counsel referred to the case of **N.T. Kate, Insurance Inspector, E.S.I. Corpn. v. Yogendra Swarup /agarwal and another (2003 (1) Mh.L.J. 145)** wherein this Court observed that the learned Magistrate had treated the matter very lightly and found out an easy way by resorting to legal technicalities which resulted in acquittal.

17. In conclusion, it may be stated that the complainant having taken different stands at different stages as to who was the owner or occupier and, as such, the principal employer of the said establishment and having failed to prove with cogent evidence that A.2 was the owner or occupier of the said establishment, in my view the acquittal of A.2 could not be faulted. Therefore, I find there is no merit in both the appeals which are hereby dismissed.

N. A. BRITTO, J.

sl.